No. 2943

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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JAMES B. SIMPSON, indicted as James B. Miller,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

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## PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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*Filed this.....day of September, 1917.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*

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*To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:*

### The Case.

Defendant was indicted for an alleged violation of Section 3 of the "Mann White Slave Act".

The indictment contains two counts. The second count of the indictment charged that James B. Miller * * * heretofore, to wit, on or about the 26th day of November, in the year of our Lord

one thousand nine hundred and fifteen * * * did knowingly, unlawfully and wilfully persuade, induce and entice a certain woman, to wit, one Vida White, alias Vida Rogers, whose full and true name, other than as herein stated, is to the grand jurors unknown, to go from one place to another in foreign commerce, that is to say, to go from the City of San Francisco, State of California, to the town of Tia Juana, in the Republic of Mexico, via the Southern Pacific Company Railroad, a common carrier, from the said City of San Francisco to the City of San Diego, California, and via automobile stage, a common carrier, from the City of San Diego, California, to the Town of Tia Juana, Mexico for a certain immoral purpose, to wit, for the purpose of having said Vida White alias Vida Rogers, manage a house of prostitution and conduct a place where persons of opposite sexes meet and have illicit sexual intercourse.

The first count differs from the second count in that it charges that the immoral purpose of defendant was "for the purpose of placing said Vida White, alias Vida Rogers, in a house of prostitution and having her remain there in said Town of Tia Juana".

The defendant interposed a demurrer to the indictment, wherein he objected to its sufficiency upon the grounds that it failed to state facts sufficient to constitute an offense. The demurrer was overruled and defendant brought to bar upon the indictment. The jury brought in a verdict of "not

guilty'' upon the first count of the indictment and a verdict of ''guilty'' upon the second count of the indictment, ''with recommendation for leniency''. That is to say, the jury found that the defendant was not guilty of enticing Vida White, alias Vida Rogers, to Tia Juana, Mexico, for the purpose of placing her in a house of prostitution and having her remain therein, but did find him guilty of enticing said Vida White, alias Vida Rogers, to Tia Juana, Mexico, for the purpose of having her manage a house of prostitution and conduct a place wherein persons of opposite sexes meet and have illicit sexual intercourse.

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**Reasons for Rehearing.**

The plaintiff in error respectfully prays the court to grant him a rehearing of the above-entitled cause, upon the following grounds:

First: We earnestly contend that the evidence contained in the record of this case is wholly insufficient to support the verdict of the jury. We submit that there is absolutely no evidence that the defendant Miller persuaded or induced or enticed Vida White, alias Vida Rogers, hereinafter called Vida Rogers, to go from San Francisco to Tia Juana, or elsewhere, for the purpose of having her manage a house of prostitution, or for any other purpose. An examination of the record itself is the best argument we can advance in support of this contention.

The first witness put upon the stand by the prosecution was Louise Bordeau. While she was undoubtedly intended to be the Government's chief witness there is practically nothing of any value to the prosecution in her testimony. She testified that in the fall of 1915 she lived in San Francisco and met Vida Rogers in a house of prostitution at No. 43 Washington Alley, where witness was engaged in prostitution and where Vida Rogers was engaged as housekeeper; that the day after Thanksgiving in November, 1915, she and Vida Rogers left San Francisco for Tia Juana. Vida Rogers received two telegrams about the time she left San Francisco. The first one was received close on to three weeks before she received the second telegram which came just a few days before she left San Francisco; that the witness saw and read the telegram. She knew the defendant in this case. She first met him in San Francisco when she was working at number 43 Washington Alley. Vida Rogers introduced her to him as Jim. Said Vida Rogers never made any statements to her in defendant's presence as to who he was. Witness never knew defendant under any other name than Jim and Jim Miller. He was introduced to her as Jim but Vida Rogers spoke to her about him as Jim Miller. She did not see the defendant a large number of times while she working at number 43 Washington Alley. She saw him perhaps three or four times in all while she was working there.

Witness further testified that she left San Francisco in company with Vida Rogers the first day after Thanksgiving, 1915, and went to Tia Juana by Southern Pacific train to San Diego. She went by herself from San Diego to Tia Juana, laying over in San Diego a day. When she and Vida Rogers arrived at San Diego Mr. Miller was at the train to meet them. *She did not see Miller any other time that morning but at the train. He was there just a very few minutes. He talked with Vida Rogers just a very few minutes. It was just "hello". "That is all I know."* She saw Vida Rogers last on Third and Broadway when she got into an auto stage that had a sign on it that said "To Tia Juana, Mexico." She went to Tia Juana herself the next day and went to the Palace, which is a dance hall and house of prostitution. She saw Vida Rogers in the Palace. Also the defendant. She remained there from November up until after the flood. Vida Rogers was running the place; she was the landlady. When witness first went there she used to see the defendant there quite often. He stayed there three or four instances that she recalled. When he was there, he ate at the restaurant for the girls connected with the Palace quite often, but she did not recall any particular statements that defendant made around the house. She did not know positively who owned the Palace, but she had heard Miller make statements that he owned it. There were twenty-two girls at the house, and four rooms in the house, and an extra house right next

door to the Palace, connected with the Palace, that had twenty-two rooms in it. All the girls were engaged in prostitution. Two or three days after Vida Rogers received the first telegram she went to San Diego. She stayed a couple of days and then came back. She received the other telegram just before we left. When witness first arrived in Tia Juana the house had five rooms, kitchen and dance hall, and that was the only house she saw there at that time but later another house was built in December. Witness did not remember what month it was finished. Witness was engaged in prostitution in the house and was required to get a license to do that. *Vida Rogers was required to get a license to run a house of that nature. She had seen her license. It was on the wall in the bar-room. The license was made to Vida Rogers. Vida Rogers also had a license to sell liquors and tobacco, and they were in the name of Vida Rogers.*

Witness also testified that when she got to San Diego she went to the San Diego Hotel. She and Vida Rogers got off the train at the Santa Fe depot and went over to the San Diego Hotel. She and Vida Rogers first went up to the Oyster Loaf together and had a bite to eat. *She never left Vida Rogers at all until she got on to the auto stage.* (Tr. 36-46 and 69-70.)

This is all the testimony of Louise Bordeau. An attempt was made by the prosecution to introduce testimony by Louise Bordeau as to the contents of the telegrams alleged to have been received by said

Vida Rogers in San Francisco in November, 1915, and indeed such testimony was given but at the suggestion of the court and on motion of Mr. Rush, attorney for defendant in the trial court, the court struck out the evidence concerning the contents of the telegrams as testified to by said witness and instructed the jury that it should consider the case without considering that testimony or any testimony that had been stricken out. (See pages 73-4 of Transcript.) Therefore, of course, the testimony of the witness with reference to the contents of said telegrams stands in the same position as if it had never been given.

Dave Gershon, the next witness called for the Government simply testified as to seeing Vida Rogers in Mexico, and his testimony was intended simply to show that Vida Rogers was without the jurisdiction of the court. (Tr. 47.)

The next witness called by the Government was *Ernest Estudillo,* whose testimony was substantially as follows:

> "I know a place in Tia Juana called the Palace and know the landlady. Her name is Vida. I knew her since I went to work in the house. I knew the place before I went to work there. I was a policeman in Tia Juana and knew that the Palace was a house of prostitution. A representative of defendant hired me to go there and work as a policeman at the Palace. Mr. Miller gave an order to a fellow by the name of Tony to pay me and I received the money in pursuance of that order. I did not know who Tony was. I did not know him

until he went into that house. I guess Tony was a bartender in the Palace. He was acting like a manager there as far as I knew. I saw Miller there a good many times. In Tia Juana the one who runs a house of prostitution must have a license. I did not pay any attention to who had a license to run that house. Tony, the bartender, or the man who appeared to be the manager in the house, paid me my wages but Mr. Miller gave the order to pay the men. He told me they would pay me more wages than I was getting at the Casino." (Tr. 48-50.)

Charles H. Cousins, the next witness called for the Government, testified in substance as follows:

"I reside in San Diego and am a carpenter and builder. I know the defendant Miller and have known him about two years. I know where the Palace is in Tia Juana. I built it last year, a year ago, some time in the fall. The defendant authorized me and hired me to build the Palace. He also paid me for building it. There was a door to go from the old building to the other building. I do not know Vida Rogers or Vida White. I saw Louise Bordeau around the new place. I do not know who the proprietress of the place was. I built both the new house and the old one. I built the old building *for Mr. Savin* four or five months before I built the new building." (Tr. 50.)

H. N. Stanley, the next witness for the Government, testified in substance as follows:

"I am a police officer in San Diego and have been there about ten years. I know the Palace in Tia Juana and have known it since it opened about a year ago. I know the defendant J. B. Miller. I have seen him in Tia Juana. I saw him at the Hot Springs and at the Palace.

> I had a conversation with him about the Palace. Officer Whistler and myself went over there to investigate a couple of girls in the place and we met Mr. Miller. I asked him in regard to these girls, and he said, 'I will see my landlady and she will give you this information.' I believe her name was White. We consulted his landlady, in his presence, and at that time I said to him, 'You might run up against a snag, Miller, running this place', and he said, 'Well, I am in the clear, I do not run it but my landlady runs it for me.' The place is a house of prostitution."

On cross-examination this witness testified as follows:

> "I testified in this matter before the Commissioner in San Diego on the 8th day of March, this year. At that time I testified as follows: He said, 'I do not know whether this girl is in here or not. I will ask my landlady and she will be able to tell you. She does all the business for me.' I says, 'You want to watch out, Miller, or you will get in a jam with her running this place', and he says, 'I am in the clear, I am not running it, my landlady runs it.' I must have omitted *'for me'* because I am positive he said 'for me'. Mr. Miller was running the Hot Springs at that time. This conversation was held in January." (Tr. 51-52.)

The testimony of *Julian Eugene Cliff,* next called for the Government, is to the effect that he was the manager of the Victoria Apartments in San Diego. He knew the defendant Miller. Defendant had an apartment in the Victoria Apartments. He moved in about September 28th, and had a phone in his apartment connected up with the exchange. Connection was made at either Mr. or Mrs. Miller's

request. The number of the Victoria Apartments, the office phone, was Main 3857. The number of the phone in his apartment was Main 6626. *The bills were sent to the Victoria Apartments and he paid it and it was added to their bill. He believed* Mr. Miller paid his telephone bill during the time he occupied the apartment. The defendant occupied a single apartment. His wife lived with him there. (Tr. 52-53.)

Arthur William Mosedale, the next witness called for the Government, testified that he was employed by the telephone company in October, 1915, and on October 11, 1915, installed a telephone in Apartment 31 of the Victoria Apartments. The number of the phone was Main 6626. (Tr. 53.)

The next witness called for the Government was F. A. Bennett, who testified in substance as follows:

> "I am the manager of the Western Union Telegraph Company at San Diego. I know the defendant Miller. He had a charge account with the company in San Diego. I have the card that he opened the charge account by. It is not customary to charge telegrams in the Western Union, unless a person has opened an account. The card is not signed by Mr. Miller. I wrote the card myself at his request and in his presence. It is one of the regular records kept by my company regarding charge accounts."

The charge card was here offered in evidence by the District Attorney as United States Exhibit Number 1 over the objection of defendant's attorney.

(Tr. 54.) The charge card is set forth in the transcript on page 54.

Mr. Bennett then continued his testimony as follows:

> "Mr. Miller requested to open it in his name, that he was not in partnership with Mr. Couden any more. That was some time in November. I don't remember the date. I cannot tell from the card. He gave his address as the Victoria Apartments. *He did not give his telephone number, that I have any record or knowledge of.* I first met him in the early part of 1915."

The district attorney here showed witness a telegram which he called United States Exhibit 2 for Identification. (This is one of the telegrams, the testimony concerning which was ordered stricken from the record by the trial judge. Tr. 73-4.)

The witness further testified:

> "This telegram was a part of my office records. *It is a telegram received by telephone. Somebody* phoned that in to be sent. In San Diego. It was filed November 15th and sent November 16th. I can tell from that record what number the telegram was phoned from. I do *not know* what telephone it was phoned from. I can say from the record, what the record shows, *I have no personal knowledge of it, other than the record. I did not receive the telephone message myself.* I know the name of the clerk that took it. I only know that from the marks on the instrument that I hold in my hand. *I have no personal knowledge whatever of how the message came into the office, who sent it into the office, by whom it was received in the office, or where it was received from, except the marks I find on it, and*

*the marks were not made in my presence or under my personal observation or direction.* In the due course of business in my company if a message is phoned in we have a special blank for copying telegrams received over the phone. On these blanks we are required to show the date, the telephone number from which it was phoned, the originating point and the destination, and the telegram is transcribed upon that blank. All these things appear to have been done, in this instance, in the telegram I hold in my hand. That is a regular record kept in the course of business of by company. I have in my possession a record showing a bill rendered to Mr. Miller in the month of November, 1915. It is a carbon copy of the bill rendered to Mr. Miller for that month. I can refer to my daily cash receipts record and tell whether that bill was paid or not.''

The witness here handed the District Attorney the daily cash receipts record which was then offered for identification and marked United States Exhibit No. 4 for Identification. The District Attorney here handed the witness United States Exhibits Nos. 2, 3 and 4. Exhibit No. 2 is the telegram ordered stricken from the records by the judge, as hereinabove stated, and Exhibits Nos. 3 and 4 are set forth in full on pages 60 and 61 of the Transcript, Exhibit No. 3 being a bill for telegram sent to Miller during the month of November, 1915, and Exhibit 4 being the daily cash record of the Western Union Telegraph Company.

The witness was then asked by the District Attorney whether or not he could tell from said records whether the telegram known as United States Ex-

hibit No. 2 was charged to Mr. Miller's account and whether the same was paid for or not. *Defendant's attorney objected to this as incompetent, irrelevant and immaterial and no proper foundation laid, and hearsay. His objection was overruled.* In support of his objection attorney for defendant elicited testimony from the witness as follows:

> "Those matters offered in evidence, that carbon copy of that bill, was made by some other employee in the company. I did not make the charge on the books. All I know about it is simply what I find in the records. Personally, I didn't have anything to do with it. As far as I know the records are accurate; there is a slight chance that they may not be."

In answer to a question of the court as to what position the witness held in the company, the witness testified:

> "I am the manager, the highest officer of the office. These records are kept under my supervision. We have a standard routine how they shall be kept. If these records were incorrect from November down I would have ascertained by this time whether or not they were correct. It is my opinion that they are correct. I have examined them. They are regular routine records. There are hundreds such records in the office. They are ordinarily kept correctly. I do not find very many mistakes in them."

Witness further testified:

> "This record, with reference to the cash, where it recites 'J. B. Miller', is written on the line and in some handwriting which is not mine, which indicates that a bill charged against J. B. Miller for the amount of two dollars and

some cents has been paid. *I do not know anything about who paid that bill and I can('t) tell from my record who paid it. There is nothing from my record that shows who the bill was presented to. I don't know anything about who it was presented to.* We had no other J. B. Miller on our charge account at that time. The defendant was the man who had the account on our books by the name of J. B. Miller.

"United States Exhibit No. 2 for Identification (the telegram stricken from the record as hereinabove stated), is in all particulars as required by the rules of my company relative to those matters that I testified to, concerning taking the name of the party over the phone, the number, and to whom the account was to be charged. It is one of the regular original telegrams as filed in our office in San Diego. A former employee in our office received that telegram, one Harrington Shaw. The last I heard of him he was in El Paso, Texas. He is the man who wrote out what is in this record of the receipt of the telegram. The bookkeeper that wrote the bill, her name is Miss Stetzel. She compiled the bill from the telegrams, and the other record was written by Miss Naylor, the cashier, who accounts for all the cash. The bookkeeper made that '48' on the corner of the telegram. The '48' on the telegram and the '48' on the bill are identical. That is, the bill was made up from this telegram. That is the amount of money that is due for it. The charge is always entered on the telegram and then transferred to the books. The date, the party addressed, the destination, and th sender's name, Mr. Miller, and the fact is marked 'Charged' over here in this corner, indicate that the telegram is chargeable to J. B. Miller, as indicated in this book."

*Myrl Stetzel,* the next witness called for the Government, testified in substance as follows:

"I am a clerk for the Western Union and was such in November, 1915. The document shown me, which has been used in evidence as United States Exhibit No. 3, I recognize. It is mine. I made that out myself. It is a bill for telegrams for the month of November. It is a carbon copy. It is in my handwriting. The original was mailed and addressed to J. B. Miller, Victoria Apartments. I made this bill out from the telegrams on file in the office. It was made out last year. The document does not show what year it was made out. The date was on the original bill but was not copied on the copy. The words 'To White' is the party that the telegram is going to, and San Francisco is the city to where it was going. The figures on the right, '48', is the amount of money that was charged for sending the telegram. The next item is on the 19th, to McMann, San Francisco, forty cents. The next was Mahon, San Francisco, 1.21, on the 20th and 21st. The next on the 23rd, to White, San Francisco, forty cents. That may have been either a telegram or a night letter. That charge on the bill is for the tax, one cent on every telegram, a war tax. I do not know what that other business is down here; I didn't put it there. I did not put any other figures except what I have read.

The COURT. Has that telegram got anything to do with the copy of the paper you have in your hand?

A. This is the 15th; that is the first telegram on there. I made that entry from this document. The '48' is in my figures. I made that charge from this paper, probably the next day, I will say the next day after it bears date, on November 15th. I mailed out the original and mailed that to this address.

The account is accurate and correct. The carbon copy I hold in my hand is simply a copy of that part of the bill as rendered. There was other printed matter on the bill that was rendered that does not appear on this carbon copy. The bill that was rendered had a date on it. When I made up this bill I made it up from the telegram, what purports to be a telegram that I hold in my hand.

Q. (By attorney for defendant). You don't know anything about where that telegram came from? You just found it among the files of the office, and following your usual course of business you made that bill from the information that was contained on that telegram, or purported telegram? May I see that just a moment? This instrument I refer to as a telegram is the one that has been marked 'United States Exhibit No. 2 for Identity' only. Now, where that came from you don't know, other than that you found it in the records of your office?

A. That is all.

Q. You don't know who wrote it, or how it got into the office?

A. Well, it was taken over the phone.

Q. What is that?

A. Is that what you want to know.

Q. I am asking you, do you know of your own knowledge——

A. No.

Q. All the knowledge you have of it is what you found on the bill itself; that is what I mean

A. *That is all I have to do with it.* (Witness continuing). *I did not talk with anybody about it, or no one told me anything about it. And the charge I made, so many cents, is the charge indicated on the telegram itself. I have no personal information from any other source whatsoever as to the amount of the charge or*

*when it was made or anything else except what I got from the telegram that I found in the files of the office and that telegram according to the rules of my office indicates that it was telephoned into the office.* The telegram is in the handwriting of H. S. Shaw, one of the clerks. As to the telegram, or purported telegram, shown to me, called United States Exhibit No. 5 for Identification, in other words, I took from the document the entries which I have in the bill which has been introduced in evidence as United States Exhibit No. 3. I listed this telegram from this bill. The rate on the telegram is the same as the rate on the bill.

Q. (By the District Attorney). Will you show me on the bill where you have listed that telegram

A. (Indicating). '11/23 White, San Francisco, 40 cents', and this U. S. Exhibit No. 5 for Identification was a part of the files of the office at that time."

The next witness called for the Government was Etta Naylor, who testified as follows:

"I was acting as cashier for the Western Union at San Diego during November and December, 1915. The document shown me, being U. S. Exhibit No. 4 (that is the daily cash record appearing at page 61 of the Transcript), was our cash register for December 9th. It is in my handwriting.

Q. I will show you a carbon copy of a bill which has been introduced in evidence as United States Exhibit No. 3 and ask you if you can show from the Exhibit No. 4 whether or not the Exhibit No. 3, the bill, has been paid?

A. Yes, sir, that is in my handwriting and it pays this bill.

(Witness continuing). I have no memory, independent of that, about the payment of that

bill. Plaintiff's Exhibit No. 4 is kept correctly. I keep it, it is balanced daily. It is a correct statement of the receipts on that day. I can tell from looking at this daily cash register item that the other item here, $2.53, appears upon that item upon that account, the daily cash register. It is here. It is the same item. I know this because the November bills are always paid in December. It corresponds exactly with the bill, and it was received the following month, and the amount is the same 2.53 on both the bill and on the cash register. The accounts are generally correct. I did not write the few words written with a lead pencil at the bottom of the bill."

On cross-examination the witness testified:

"*I have no independent recollection of the payment of that bill. All that I know about it is that I found it in the records kept by me, and the record shows it was paid.* I assume that the *2.53 is the amount of the bill for the month before because it is the same amount. If another individual, or the same individual, paid the same amount for some other purpose, it would appear on my cash just the same. I do not know who paid that bill, and I have no knowledge of how it was paid. I haven't any idea whether it was paid by cash or by check, or by what individual. I don't know how the bill went out to the person who paid it, if it ever did go out, because I do not handle that part of the work. All I know is what the record shows, and the record shows that on December 9th J. B. Miller is credited with cash 2.53.*"

Mr. F. A. Bennett was then recalled on behalf of the Government, and testified as follows:

"Q. I will show you a document which has been introduced as United States Exhibit No. 5

for Identification, and ask you if you know what it is.

Mr. Rush. I object to that as calling for a conclusion of the witness, and incompetent, irrelevant and immaterial.

The Court. Do not state the contents of it.

Q. (By Mr. Moody). Do you know what it is?

A. It is a telegram. (Witness continuing.) I got it out of our office files at San Diego. It is the original record. It bears sending marks. It would not bear those marks if it were not sent.

Q. I will show you a record which I will designate as U. S. Exhibit No. 6 for Identification and ask you if you know what it is.

A. A copy of a telegram. It is a record of our office in San Diego and is a copy of a received message. It was received November 26, 1915. It is a carbon copy of the original message made at the time the original was received. I have a record with me showing whether or not the telegram, or the original of which this is a carbon copy, was delivered in San Diego."

Witness here hands Mr. Moody a document which is marked for identification as No. 7.

Q. (Mr. Moody). "Now, this No. 7 for Identification, is what, Mr. Bennett?

A. It is a delivery sheet for November 26th. It shows the delivery of telegram 451 in San Diego."

United States Exhibit No. 7, together with the bond as an exemplar of the signature of the defendant, was then offered in evidence by the District Attorney, was objected to by the attorney for the defendant, and the objection was sustained. The District Attorney then stated:

"At this time we desire to offer all the telegrams, United States Exhibits Nos. 5 and 2 for Identification, and offer them as exhibits at this time.

Mr. RUSH (attorney for defendant). The defendant objects to the offer of those instruments, and each of them, on the ground that they are incompetent, irrelevant and immaterial, that no proper foundation has been laid for their introduction, and that they are not the best evidence, and they are hearsay.

The COURT. The objection will be sustained.

Mr. MOODY. That is all, Mr. Bennett. The Government rests."

Then the following proceedings occurred:

"The COURT. Well, now, over the objection of the defendant, a witness was permitted to testify to the contents of a telegram in the hands of Vida White at San Francisco. What do you desire to do with that for the defendant? It was admitted on certain representations made by the United States Attorney, which undoubtedly were made in good faith.

Mr. RUSH (attorney for defendant). We move that that testimony of the witness Louise Bordeau, concerning and referring to a telegram which she said she saw in the hands of Vida White or Vida Rogers in San Francisco—that all such testimony be stricken out on the grounds stated in the objection at the time the objection was interposed to such testimony; and on the further ground that the proper foundation has not since been laid for the introduction of that testimony, and it has not been connected up with the defendant.

The COURT. I will strike the evidence out concerning the contents of the telegram, as testified to by the witness; and I instruct you, gentlemen of the jury, that you shall consider

this case without considering that testimony, and shall not consider any testimony that has been stricken out.

Mr. Rush. May it please the Court, the defendant at this time moves the Court to instruct the jury to find a verdict of not guilty, on the ground that there is not sufficient evidence to sustain a conviction for this offense upon this charge, or either count of it.

The Court. The motion will be denied.

Mr. Rush. We rest."

I feel it necessary at this point to apolgize for the great length of this brief, and wish to assure the court that I inserted the evidence herein as fully as I have in an effort to relieve the court of the necessity of constantly referring to the transcript in passing upon my contention that there is no evidence in the record to support the verdict of the jury in this case.

All that is proven by the testimony of Louise Bordeau is that in November, 1915, she was engaged in prostitution in San Francisco in a house of prostitution over which Vida Rogers presided as housekeeper or landlady. That she there met the defendant three or four times, and he was introduced to her by Vida Rogers as Jim. That in November, 1915, Vida Rogers received two telegrams. All testimony as to the contents of these telegrams was stricken from the record, and therefore, as far as Louise Bordeau's testimony is concerned, at least, there is simply the bald fact that Vida Rogers received two telegrams. There is not a word to show whence the telegrams came, who

wrote them, or what they contained. There is an absolute failure to connect those telegrams with the defendant in the case, and, there is not a single scrap of testimony anywhere in the records as to what the contents of those telegrams was. For aught that appears of record those telegrams might have been sent to the Rogers women by anyone. Indeed it is a matter of small moment to this case who sent them, as there is no evidence as to what their contents were. They might have contained matters totally unrelated to the matters in issue herein, and it is certain, as far as the record is concerned, and it is with the record alone we are concerned, the witness's testimony as to these two telegrams is of no more value than if she had testified that two blank pieces of paper had been wafted in through an open window, from nowhere, from nobody, and containing no message.

The learned district attorney has inserted in his brief (pages 19-20-21-22) the contents of certain documents which were refused admittance in evidence in the trial court. These documents purported to give the contents of certain telegrams purporting to have passed between someone at telephone number Main 6626 in San Diego and one Miss Lydia White at San Francisco. As they were denied admission in the court below they certainly have no place in the record of this court, either in the transcript of testimony, where they are not found, or in the brief of the district attorney, where they are found.

The witness Louise Bordeau further testified that after receiving the two telegrams she and Vida Rogers went to San Diego; that defendant met them at the train where he "talked" with Vida Rogers. *It was just "hello". That she did not see defendant any more that morning. She also testified that she never left Vida Rogers at all that day until Vida Rogers got on the auto stage to Tia Juana.* That she went to Tia Juana herself the next day and stayed at the Palace, a house of prostitution, where she saw defendant quite often; that she did not know positively who owned the Palace, but had heard defendant makes statements that he owned it.

Your Honors will notice that there is not a word of evidence connecting the departure of Vida Rogers from San Francisco to Tia Juana with the receipt of the two telegrams in November. No statement of Vida Rogers, either in San Francisco or later in Tia Juana, connects defendant with her coming to Tia Juana. There is no *direct* evidence to the effect that defendant was the owner of the Palace. Only loose statements by a couple of witnesses as to statements alleged to have been made by defendant. Counter to this is the fact that the license to conduct this house of prostitution was issued in the name of Vida Rogers. But even if he was the owner that is no evidence that he induced or enticed Vida Rogers to manage it for him. Running a house of prostitution is a detestable and contemptible business, but it does not prove him guilty of the crime charged here—nor does it operate to bar

him from the benefit of the legal presumptions and rules of law obviously applicable here.

The receipt of two blank telegrams—from nobody—from nowhere—taking a train to San Diego—meeting defendant at the train and saying "hello" to him, and afterwards appearing as landlady in the Palace at Tia Juana, seems to me to fall very far short of the proof required to convict the defendant in this case of wilfully persuading, inducing, or enticing Vida Rogers to go from San Francisco to Tia Juana for the purpose of having her manage a house of prostitution for him.

The case at bar seems to me to be even weaker in the matter of proof than the case of Johnson v. U. S., reported in 215 Fed. 679-82. In this case the defendant was indicted and convicted upon several counts, one of the counts charging him with placing the complaining witness in a house of prostitution. The conviction on this count was reversed, the court saying:

> "Telephone and telegraph messages contained no suggestion of prostitution. The only fact is that several days after the girls arrived in Chicago *defendant supplied the money* to enable her to open and conduct a brothel. This fact might lead to a suspicion that when providing transportation he had the intention to aid her subsequently in her profession. But criminal convictions cannot be allowed to rest on suspicion."

Confining ourselves to the record, as we must of necessity, I earnestly assert that it does not develop

sufficient evidence upon which to base even a fair suspicion of defendant's guilt of the crime charged. The jury on the same evidence might just as happily have brought in a verdict convicting him of the crime of persuading Louise Bordeau of entering a house of prostitution. He furnished no money —there is no evidence of any agreement between defendant and Vida Rogers—no conversations, letters, or *telegrams*—absolutely nothing but the fact that she did come to Tia Juana from San Francisco, and upon her arrival did manage a house of prostitution, the license for which was issued in her name, and was hung by her on the wall in the bar-room. (Tr. 46.)

The learned judge of this court who wrote the opinion as to which we are now asking a rehearing, in speaking of the sufficiency of the evidence referred to two telegrams shown by the records of the Western Union Company at San Diego to have been sent to one White at San Francisco on November 15th and November 23rd, respectively. In this connection we respectfully suggest that as all telegrams alleged to have been received or sent by Vida White were stricken from the record; the proof offered as preliminary to the admission of any telegrams is absolutely foreign to the record. The admission of these records of the Western Union Company was strongly and consistently objected to by defendant, and their admission over such objections was assigned as error, and I herein-

after urge it is a separate and further reason for a rehearing herein.

Second. The second ground upon which we seek a rehearing is that the acts charged in the second count do not come within the scope of the "White Slave Act". Inducing a woman to go from one place to another in interstate or foreign commerce for the purpose of managing a house of prostitution does not fall within any of the immoral purposes prohibited by that act. In the opinion of the learned judges of the Circuit Court of Appeals herein, confirming the conviction in this matter, the following language appears:

> "It is to be conceded that under the rule of *ejus dem generis* the phrase 'other immorality' implies sexual immorality, but it would be too rigorous an application of this rule to limit the phrase to the personal sexual immorality of the woman herself."

We hope to be able to induce this court to change its views in this regard. It being conceded in the court's opinion that "other immorality" implies *sexual immorality,* we believe that the court's opinion that it would be "too rigorous an application of this rule to limit the phrase to personal sexual immorality of the woman herself," cannot, upon closer examination, be sustained. Sexual immorality is, of necessity, a personal immorality. One cannot be sexually immoral, once removed, so to speak. The manager of a house of prostitution, no doubt, is immoral regardless of the fact as to whether or not she is sexually immoral, but the immorality

involved in managing a brothel is an entirely distinct and separate kind of immorality. It is not difficult to conceive of a person being sexually immoral, and yet being otherwise—possessed of all the virtues which go to make the character of an honest and likeable man. Not so with the immorality involved in the management of a brothel. It is a cold, cruel and sinister profession, and the immorality involved has nothing in common with the immorality comprehended within the words "sexual immorality." The two kinds of immorality are as far apart as the poles and as far apart as the passions in which they are conceived. The one the child of perverted passion, the other the offspring of cold, cruel and calculating greed. The one immoral, the other unmoral.

The Orientals placed the management of their harems in the hands of eunuchs. Could they by any possible stretch of the imagination be characterized as being sexually immoral?

Would a female physician regularly retained to serve such a house be, from the mere fact of being in such a service, "sexually immoral"; and would her importation from San Francisco to Tia Juana for such a purpose be a violation of the White Slave Act? The same question is pertinent with reference to chambermaids and others employed in and around such a place, in capacities other than as prostitutes.

There is no question in this case of prostitution. The defendant by the first count of the indictment

was charged with placing Vida Rogers in a house of prostitution, and of this charge he was declared not guilty by the verdict of the jury. The case, then, must stand or fall on the immorality involved in *managing* a house of prostitution.

We have examined all the reported cases dealing with the violation of the "White Slave Act" and have found none dealing with anything but the personal sexual immorality of the "slave" involved.

This court in its opinion herein says that there is nothing in the case of Suslak v. U. S., 213 Fed. 913, which is inconsistent with the opinion of the court that the law ought not to be limited to cases of personal sexual immorality of the woman herself. In that case the court says:

> "Whether the woman be pure or impure, if her transportation be for the purpose of sexual immorality, the statute is violated. Such a meaning, it is thought, both the spirit and the purpose of the statute imply."

There is also a definition of "prostitution" and "debauchery" as used in this statute, all of which seem to be fairly pregnant with the idea that the statute deals with "personal sexual immorality" rather than the management of it.

We respectfully submit that the Athanesaw case, 227 U. S. 326, does not support the construction placed upon the act by this court. In that case the charge made was that defendant therein had induced the girl involved to travel from one state to another for the purpose of "debauchery". Defend-

ants in that case were not charged with placing the girl in a low dance hall or theatre, but were charged with importing her for the purpose of "debauchery".

In the case at bar the charge is not the inducement of Vida White for purposes of prostitution or debauchery, but for the purpose of making her the manager of a house of prostitution. And therein lies the distinction between the two cases. Had they charged "debauchery" in the case at bar it would probably have met the same fate as the count containing the "prostitution charge"—in a verdict of not guilty. You cannot charge a man with "engaging a woman to manage a house of prostitution", and convict him of "debauchery", and we apprehend that had the indictment in the Athanesaw case charged that the purpose of the induucement was to "place the girl in a dance hall" it would not come within the "White Slave Act". Further, to this point, in its opinion herein the court says:

> "For one having a house of prostitution in Mexico to induce a woman to go there to become the *efficient means* for what is perhaps the most offensive form of the evil against which the statute is expressly directed, would admittedly be violative of the letter and, as we think, clearly contrary to the spirit of the statute."

It is true that the intent of the act is to stamp out the white slave traffic, but in our opinion both the letter and spirit of the act treat only of the traffic in "white slaves"—that is to say, the traffic in girls

designed to be used in prostitution, debauchery, or any other immoral practices.

And the other immoral practices with which the act deals under the doctrine of *ejus dem generis* means the other and even lower forms of perversion which exist as a by-product of such places. The statute was meant to deal with the importation of "slaves" and not with the importation of their masters and mistresses; with the importation of the victims of the evil and not with the efficient means for maintaining the evil.

Surely if Congress had intended to include in the prohibitions of the statute the transportation from state to state of the masters and mistresses of the "slave traffic", it would not have left the inclusion of the master slave as a vague and indefinite generality following upon the express and clear designation of their victims.

Third. Our third point is that the verdict of the jury and judgment of the court should be reversed because of the introduction in evidence of secondary evidence of the contents of the two telegrams alleged to have been received by Vida Rogers from the defendant on November 15th and on November 23, 1915. In its opinion herein the court concedes that this evidence was improvidently received and states that the only question now is whether under all the circumstances of the case its reception constitutes reversible error. In view of the fact that outside of these two telegrams, and charge accounts.

telephone numbers and bills connected therewith, the admission of which were objected to by counsel for defendant, and form our fourth reason for asking for a rehearing herein and which will be immediately hereafter taken up, we believe their admission was fatally prejudicial to the rights of the defendant in this action. The condition of the record and the evidence without these telegrams leads inevitably to the conclusion that the defendant was convicted by the jury upon the strength of these telegrams and upon nothing else.

In treating of this error of the trial court the court in its opinion herein says:

> "It was upon the court's own motion that the testimony was received subject to a motion to strike it out later on, and to this course no objection was raised by the defendant."

In this the court is mistaken as an examination of the record will disclose. The matter is treated as follows in the record:

> "Q. (By district attorney). I will exhibit to you a telegram which I will call United States Exhibit 1 for Identification and I will ask you if that is the wording of the telegram that you say that this woman received?
>
> Mr. Rush (attorney for defendant). Just a moment. I object to that question as incompetent, irrelevant and immaterial." (Tr. 36.)

After this there was some discussion between the court and the district attorney, at the end of which Mr. Rush, attorney for defendant, said:

"I want to add to my objection the further ground that it calls for hearsay." (Tr. 37.)

Some further discussion followed and then the district attorney offered to withdraw not the telegrams but the witness. Then the following occurred:

"The COURT. Well, I will not require you to withdraw her. Upon your representation that you expect to do it, I will permit the evidence, and I will strike it out if you fail to produce the evidence.

Mr. RUSH (attorney for defendant). Your Honor, before your Honor rules willl you permit me to just suggest one matter, and that is this: I do it because I don't think your Honor apprehends the point of my objection. Before it can be shown that a telegram was received in San Francisco by this woman, or by anyone, it must be shown a telegram was sent, it must be proven it was sent by this defendant. So to show this woman a writing, or what purports to be a copy—not the thing that she saw there, but something containing the same language that she saw there—and ask her to refresh her memory from that, and say that that is the same language that was in the telegram that she saw in San Francisco, in any event would not be competent. She can only refresh her recollection from memoranda that she made herself. She cannot refresh her recollection from memoranda made by some one else, and which she, herself, did not see made, and never saw before this time. This, at the most, would be simply a memorandum of what the operator in the town from which it was sent, sent, and is not the identical object that she saw." (Tr. 38-39.)

Then followed discussion between Mr. Moody and the court and some questions of the witness Louise

Bordeau, and then next came the question "What was the substance of it (the telegram)?"

"Mr. RUSH (attorney for defendant). We object to that as incompetent, irrelevant and immaterial, and no proper foundation laid, and hearsay.

The COURT. Well, on the promise of the United States Attorney that they will show that the recipient of the telegram is not in the jurisdiction of the court, the objection will be overruled.

Q. (By the court). Now, did this woman keep the telegram after you saw it? Was it in her possession the last time you saw it?

A. Yes, your Honor.

Q. Well, answer the question.

Mr. RUSH (attorney for defendant). We except to the ruling of the court. I understand—the court will pardon me if I inquire, in this court, do we have to enter an exception to the ruling if we desire it, or does the rule that applies in the state court apply here now?

The COURT. You can have a stipulation on that subject, if you desire it, to have an exception entered.

Mr. RUSH. Will you stipulate that any time we object, we need not enter an exception, but that the exception may be presumed to have been preserved and entered, without going through the necessity in each instance?

Mr. MOODY. I will so stipulate—in order to expedite the case—I will stipulate an exception may be deemed taken to all rulings." (Tr. 41-42.)

As to the other telegram received the defendant in a like manner objected and preserved an exception to the admission of its contents. (Tr. 43.)

The rights of the defendant, as the court will observe from these excerpts of the record, were preserved both by objection and exception, and by stipulation between the District Attorney and the attorney for the defendant. All that can be reasonably expected of counsel for the defendant, and all that counsel for defendant could with propriety interpose were the objections and exceptions made and taken.

As to the fact that when the testimony was subsequently stricken out by the court there was no request that a stronger admonition be given to the jury, or that other means be adopted for the protection of the defendant against possible prejudice, we can only say that the charge of the court in this regard was sufficient in all respects, as far as form was concerned, and we question whether counsel for defendant could have possibly asked for any other instructions than the instructions given, that

> "the jury should consider the case without considering that testimony, and should not consider any testimony that has been stricken out".

At any rate, the damage was done. In our opinion no instructions, however complete and specific, would have sufficed to repair the injury done the rights of defendant by the prejudicial admission of these two telegrams in evidence. The condition of the record leaves no doubt in our minds that these telegrams were the cause of defendant's conviction, and as a matter of fact and common knowledge we know that it is practically impossible to take such

matters from the consideration of the jury by any admonition or instruction.

I think what we have shown above ought to relieve the attorney for the defendant in this matter in the trial court from the suggestion that the incident of the introduction of these telegrams in evidence was treated *casually* by him, at least. We question whether he could have gone further and still maintain the proper respect for the ruling of the court that should be the aim of all officers of the court.

Fourth. Finally we ask this court to grant us a rehearing upon the ground that the lower court erred in admitting in evidence two exhibits offered by the Government, involving the records of the telegraph company at San Diego. (Tr. 60-61.) In regard to these two exhibits the court in its opinion herein was laboring under the impression that no objection was offered to their reception in evidence, the court saying:

> "Although no objections were made or exceptions taken to the reception of two exhibits offered by the government involving the records of the telegraph company * * * in the absence of objection to the introduction of the exhibits we would not be warranted in setting aside the verdict for a defect which might very easily have been cured, had the defendant raised an objection at the time."

The record, however, does show that the defendant did offer vigorous and persistent objection, and therefore we ask this honorable court for a rehearing so that the defendant may be given the full

benefit of his objections as shown by the record. We respectfully call the court's attention to the condition of the record in this respect. At page fifty-seven of the transcript the following appears:

> "Mr. Moody. I will offer the bill and the daily cash receipts in evidence, before I offer the telegrams—that is 3 and 4.
>
> Mr. Rush. To each of them we object on the ground that they are incompetent, irrelevant and immaterial and not the best evidence and hearsay. Before the court rules I would like to ask the witness a few questions.
>
> The Court. All right, proceed.
>
> Mr. Rush. Mr. Bennett, those matters that you offered, for instance, that carbon copy of that bill, did you make that copy yourself?
>
> Answer. No, sir. It was made by some other employee of the company. I did not make the charge on the books. All I know about it is simply what I find in the records. Personally, I didn't have anything to do with it. As far as I know the records are accurate; there is a slight chance that they may not be.
>
> Mr. Rush. We submit the objection.
>
> The court here asked the witness a few questions, and then said—I will overrule the objection.
>
> Mr. Rush. Your Honor, may I ask just one question?
>
> The Court. Yes, sir.
>
> Mr. Rush. This record with reference to the cash, where it recites, 'J. B. Miller,' is written on the line there in some handwriting which I take it is not yours?
>
> A. No, sir.
>
> Q. Which indicates that a bill charged against J. B. Miller for the amount of two dollars and some cents has been paid?
>
> A. Yes, sir. I do not know anything about who paid that bill, and I can('t) tell from my

record who paid it. There is nothing from my record which shows who the bill was presented to. I do not know anything about who it was presented to.

Mr. RUSH. I submit the objection.

Q. (Mr. Moody). Did you have any other J. B. Miller on your charge account at that time?

A. No, sir.

Q. (By the court). The defendant was the man who had the account on your books by the name of J. B. Miller?

A. Yes, sir.

The COURT. Objection overruled.

Mr. RUSH. Exception."

The introduction of the disputed evidence follows immediately after this, appearing on pages sixty and sixty-one of the transcript.

The record leaves no question but that the defendant objected early and often to the introduction of this evidence, and that both the district attorney and the judge of the trial court each took a hand in questioning the witness in an effort to meet the defedant's objections.

In addition we wish most earnestly to urge that as the telegrams with which these records are concerned were ruled out of evidence, the attempted preliminary proof of their authorship should share the same fate automatically. The mere sending of a telegram, the contents of which is unknown, cannot, we submit, have any probative force whatever. For aught that appears of record these telegrams might have related to matters absolutely foreign to the matters involved in this case. To assume that

these telegrams contained matters which would connect defendant criminally with the crime charged herein, would, it seems to us, have the effect of depriving the defendant of the well-founded presumption that a man is innocent until he is proven guilty. This is an important matter in this case as this court has referred to the fact that these records show that defendant was in telegraphic communication with Vida White, or Rogers, as one of the substantial items of evidence which showed the defendant's guilt of the crime charged.

We respectfully pray the court to grant the plaintiff in error a rehearing in the above-entitled cause.

Dated, San Francisco,
September 4, 1917.

THOMAS E. HAYDEN,
*Attorney for Plaintiff in Error and Petitioner.*

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CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

THOMAS E. HAYDEN,
*Counsel for Plaintiff in Error and Petitioner.*